No. 9990

United States Circuit Court of Appeals

For the Ninth Circuit

THE CITY OF FORSYTH, A municipal corporation of The State of Montana, and FAIRBANKS, MORSE & CO., a corporation,

Appellants,

vs.

MOUNTAIN STATES POWER COMPANY, a corporation,

Appellee.

Appellee's Brief

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SUBJECT INDEX

TEXTBOOKS AND STATUTES CITED

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STATEMENT OF PLEADINGS

The admitted facts of this case are summarized in the opinion of the District Court (R. p. 61 and in 41 Fed. Supp. 389), and may be briefly stated as follows:

The plaintiff and appellee is and has been for several years the owner of an electric light and power plant or system in the City of Forsyth, consisting, in part, of poles and wires in the streets and alleys of said city, and engaged in furnishing electric light and power to said City and the people of said City at rates prescribed by the Public Service

Commission of Montana, which plant or system was constructed by the predecessor in interest and ownership of the appellee.

The appellant, The City of Forsyth, has entered into a contract with the appellant, Fairbanks, Morse & Co., for the construction of a municipal light, heat and power plant, in accordance with the plans and specifications made a part of said contract, for the consideration of $169,969.00, to be paid from the earnings of said plant. The plant to remain the property of the contractor, Fairbanks, Morse & Co., until paid for. In the specifications, made a part of said contract, it is provided:

"Completion

The contractor will not be required to begin work until ten days after litigation for the ousting of the power company now serving the city from its streets has been finally determined in favor of the city. The work shall be completed within 180 days after commencement."

"Removal of Competition

The City undertakes to promptly institute such legal action or proceeding it may deem proper or advisable to have it declared by a judgment of a court of competent jurisdiction that the Public Service Corporation now serving the City and its inhabitants has no right to use or occupy the streets, alleys or public grounds of the City with its poles, wires, or other instrumentalities, and that it be required

to remove all of its equipment therefrom when the proposed plant of the City is ready for production and distribution of electricity so that the City shall be free of its competition."

In the complaint, paragraph VII (R. p. 13) it is alleged:

"The City is without power or authority to make or enter into said proposed contract and if said contract is entered into and said plant or system is constructed, as provided in said contract, the said City will become a competitor of plaintiff and take from plaintiff many of its customers and patrons, to its great and irreparable damage and injury."

In paragraph X of the complaint (R. p. 14) it is alleged:

"Plaintiff has a franchise, by virtue of section 6645 of the Revised Codes of Montana of 1935, to occupy the streets, alleys and public grounds of said city with its poles and wires and the right to furnish electric light and power to said city and the inhabitants thereof, as it is now doing, and the action of said City in advertising for bids, holding said election and proposing to enter into said contract casts a cloud upon the title of this plaintiff to said franchise and right to furnish electric light and power, as aforesaid."

The allegations of paragraphs VII and X are denied by the answers.

The prayer of the complaint is as follows:

"1. That the plaintiff be granted a preliminary injunction enjoining the defendant City from removing the poles and wires of this plaintiff from the streets and alleys of said City or from in any manner interfering with the plant or system of this plaintiff, or the operation of same, and that the said defendants be enjoined from entering into said proposed contract, or, if said contract has been entered into, that said Fairbanks, Morse & Co. be enjoined from constructing such plant or system in accordance with said plans or specifications, or otherwise, and, upon final hearing, said injunction be made permanent."

JURISDICTION

It is first contended, in behalf of appellants, that the District Court was without jurisdiction for the reason that the amount in controversy does not exceed the sum of $3000.00, exclusive of interest and costs.

In Volume 1 of Foster Federal Practice, Sixth Edition, page 50, it is said:

> "In a suit for an injunction, the value of the matter in dispute is that of the object of the bill, namely, the value, to the plaintiff, of the right for which he prays protection; *or the value, to the defendant, of the acts of which the plaintiff prays prevention;*" (Italics ours).

What is the matter in controversy or dispute in this action?

1. The appellee alleges that it has a franchise granted by the state authorizing the maintenance and operation of its electric plant or system in the City of Forsyth, and the furnishing of electric light and power to said City and the inhabitants thereof. This is denied by appellants. By the contract for the construction of a municipal plant, the City is required to take whatever proceeding is necessary to compel the appellee to remove its poles and wires from the streets and alleys and cease operation of its plant.

The City has entered into a contract with Fairbanks, Morse & Co., for the construction of a municipal plant to cost $169,969.00, and which plant is to be owned by the City when paid for by the earnings therefrom. It is alleged in the complaint that the City is wholly without authority to enter into such a contract and an injunction is sought to prevent the performance of this contract.

In the brief for appellants, at page 50, it is said:

> "If the appellee is not ousted then the contract, by its own terms, is at an end. If it is determined that the appellee can be ousted, then the contract is in effect, and the appellant Fairbanks, Morse & Company is obliged to proceed."

It thus appears that the value of the matter in controversy is the value to the appellee of its alleged franchise and the value to the appellants of the contract for the construction of a municipal plant, at a cost of $169,969.00.

In the case of Northern Pacific Ry. Co. v. Pacific Coast Lbr. M. Assn., 165 Fed. 1, decided by the Circuit Court of Appeals for this Circuit, which was an action for an injunction to prevent the Northern Pacific and other railway companies named as defendants from putting into effect certain rates in excess of the then existing rates, the court, in the opinion, at page 11, said:

> "Objection is made to the jurisdiction on the ground that it does not appear from the bill that the necessary jurisdictional amount is in controversy. The bill alleges that the matter in controversy 'exceeds, exclusive of interest and costs, the sum and value of $2,000.' In Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682, it was held that a suit cannot properly be dismissed by a Circuit Court as not involving a controversy of an amount sufficient to come within its jurisdiction unless the facts appear upon the record to create a legal certainty of that conclusion. In Lee v. Watson, 1 Wall. 339, 17 L. Ed. 557, it was said:
>
> "By 'matter in dispute' is meant the subject of the litigation—the matter for which the suit is brought and upon which issue is joined, and in relation to which jurors are called and witnesses examined."
>
> The matter in dispute in the present suit is the right of the appellants to enforce a proposed schedule of rates. Railroad Co. v. Ward, 2

Black, 485, 17 L. Ed. 311. In principle the case is similar to Washington Market Co. v. Hoffman, 101 U. S. 112, 25 L. Ed. 782, a suit in which a number of complainants whose several interests did not equal the jurisdictional amount sought to enjoin the market company from interefering with their right to occupy their respective stalls. The court said:

"The case is one of two hundred and six complainants suing jointly. The decree is a single one in favor of them all and in denial of the right claimed by the company, which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowable."

In Brown v. Trousdale, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. Ed. 987, the complainants were taxpayers who sought to restrain the collection of interest and principal on bonds alleged to have been unlawfully issued by the county. The court said:

"The rule applicable to plaintiffs each claiming under a separate and distinct right in respect to a separate and distinct liability and that contested by the adverse party is not applicable here."

So in City of Ottumwa v. City Water Supply, 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604, in a suit by a taxpayer to enjoin the city from issuing bonds, it was held that the power of the city

to issue such bonds is the matter in dispute for the purpose of ascertaining the amount or value in controversy, and not the tax to which the complainant would be subjected. Other cases in point are Texas & P. Ry. Co. v. Kuteman, 54 Fed. 548, 4 C. C. A. 503; American Fisheries v. Lennen, (C. C.) 118 Fed. 869. But if it is necessary that the bill aver the requisite amount in controversy as to each complainant it is evident from the facts stated that such an averment can be made by amendment, and its absence from the bill is not ground for reversing the injunction order."

In the case of City of Ottumwa v. City Water Supply Company, 119 Fed. 315, decided by the Circuit Court of Appeals for the 8th Circuit, which was an action for an injunction to prevent the City of Ottumwa from issuing bonds for the purpose of erecting water works, the court, at page 318, said:

"But the city of Ottumwa was about to enter into the proposed contract for the erection of waterworks, and issue and negotiate bonds of the city as proposed to the amount of $398,900 to procure money to pay for the same. Complainant contends that the city, being already indebted beyond the constitutional limit, has no right or power to enter into such contract or issue such bonds. Whether it has or has not such power to issue and negotiate that large amount of bonds is certainly the matter in dis-

pute in this suit, brought to restrain and prohibit the city from taking such action." (Citing several cases.)

In the case of The Miss. & Mo. R. R. Co. v. Ward, 67 U. S. 485, 17 L. Ed. 311, which was an action for an injunction for the abatement of a railroad bridge across the Mississippi River as a nuisance, the court said:

> "But the want of a sufficient amount of damage having been sustained to give the Federal Courts jurisdiction, will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern."

In the case of Washington Market Co. v. Hoffman, 101 U. S. 112, 25 L. Ed. 782, which was an action for injunction to prevent the Washington Market Company from selling a stall in their market occupied by the plaintiff in the case, the plaintiff claiming the right to possession, the court said:

> "The first question to be determined is, whether the amount in controversy is sufficient to give us jurisdiction of the appeal. Upon this we have no doubt. * * * * It is averred under oath in the pleadings, that the sale which the Company proposed to make, and the court below enjoined, would have realized to the Market Company more than $60,000. Of this benefit the decree deprives them. It is very plain, therefore, that the appeal is one within our jurisdiction."

In the case of American Smelting & Refining Co. v. Godfrey, 158 Fed. 225, which was an action to enjoin the operation of a smelter as a nuisance, the court, in the opinion, at page 229, said:

> "But none of these cases can apply here, for the test of jurisdiction is not the amount of damage actually sustained by each of the complainants, but is the value of the object sought by the bill, which in this case is to compel the defendants to cease operating their smelters, or to use such appliances in conducting the work as will effectually protect the complainants from the injuries complained of."

In the case of Cowell v. City Water Supply Co., 121 Fed. 53, which was a suit for an injunction, decided by the Circuit Court of Appeals for the 8th Circuit, in an opinion by Circuit Judge Sanborn, the court said:

> "Perhaps these cases sufficiently illustrate and establish the rule that it is the amount or value of that which the complainant claims to recover, or the sum or value of that which the defendant will lose if the complainant succeeds in his suit, that constitutes the jurisdictional sum or value of the matter in dispute, which tests the jurisdiction of the Circuit Courts of the United States." (Citing many cases).

See also:

> Johnson v. City of Pittsburgh, 106 Fed. 753.

The argument for appellants and the authorities

cited in support of the objection to jurisdiction are upon the assumption that the object or purpose of this action is to prevent the City from becoming a competitor of appellee and that the value of the matter in controversy is the loss which appellee would suffer from such competition. This argument completely overlooks the fact that the main purpose of appellee is to protect its franchise and property by judicial determination that it has a valid franchise and the right to maintain and operate its electric plant or system. If the appellants should prevail, appellee would be required to remove its poles and wires from the streets and alleys of the City of Forsyth.

As said by this Court in the case of Gavica v. Donaugh, U. S. Attorney, 93 Fed. (2d) 173:

> "The matters in controversy are the rights which plaintiffs assert and seek to have protected and enforced."

We will not undertake to review the authorities cited in the brief for appellants on the question of jurisdiction. They are clearly distinguishable and, as before stated, are presented on the assumption that the object of this action is to prevent the proposed municipal plant from operating in competition with the plant of appellee.

As said by this court in the case of N. P. Ry. Co. v. Pacific Coast Lbr. M. Assn., 165 Fed. 1:

> "In Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682, it was held that a suit can-

not properly be dismissed by a Circuit Court as not involving a controversy of an amount sufficient to come within its jurisdiction unless the facts appear upon the record to create a legal certainty of that conclusion."

APPELLEE HAS A FRANCHISE

Appellants in their brief (p. 50) say: "If the appellee is not ousted then the contract, by its own terms, is at an end". If it is determined that the appellee can be ousted, then the contract is in effect and the appellant, Fairbanks, Morse & Co., is obliged to proceed.

It follows from this concession that if appellee has a franchise, it cannot be "ousted" or, in other words, required to remove its poles and wires from the streets and, therefore, the other questions presented in the brief for appellants are immaterial and the judgment of the District Court must be affirmed.

Section 6645 of the Revised Codes of Montana of 1935 provides as follows:

> *"Rights-of-way for pole lines along streets, roads and highways.* A telegraph, telephone, electric light, or electric power line, corporation, or a person owning or operating such, is hereby authorized to install its respective plants and appliances necessary for service, and to supply and distribute electricity for lighting, heating, power, and other purposes, and to that end to construct such telegraph, telephone, electric

light, or electric power line or power lines, from point to point, along and upon any of the public roads, streets, and highways in the State of Montana, by the erection of necessary fixtures, including posts, piers, and abutments necessary for the wires, but the same shall be so constructed as not to incommode or endanger the public in the use of said roads, streets, or highways, and nothing herein shall be so construed as to restrict the powers of city or town councils."

Except as limited by constitutional restrictions, the power of the legislature to grant public utility franchises in cities and towns in this state is paramount and exclusive. As stated in 26 Corpus Juris, Paragraph 41, pp. 1024 to 1025:

"In the United States the people have succeeded to all the rights and privileges of the Crown, and the legislative department of the government *has exclusive power to grant franchises,* subject, of course, to such constitutional limitations as are applicable." (Italics ours.)

So, in 43 Corpus Juris, Paragraph 304, pp. 285 to 286, the principle is stated as follows:

"Ordinarily the legislature is the supreme authority in regard to public rights in the streets and highways. And, except as limited in the constitution, it has jurisdiction to grant franchises to be exercised in the streets of the cities and other public highways in the state. * * * The legislature may enlarge the powers of a

public service corporation, as against the city, except where the constitution provides otherwise. * * * Usually the legislature requires that the street railway companies shall obtain their franchise from the city, although the legislature retains the right of regulation, but in the absence of constitutional restriction these franchises may be conferred by the legislature directly without regard to corporate authority." Citing, with other cases, in support of the text: Helena v. Helena Light & Ry. Co., 63 Mont. 108, 207 Pac. 337.

To the same effect:

12 Ruling Case Law, "Franchises", Paragraph 13, page 187.

The only restriction of legislative authority to grant franchises for the use and occupancy of city streets in this state is that contained in Section 12 of Article XV of the Montana Constitution, which provides that:

"No street or other railroad shall be constructed within any city or town without the consent of the local authorities having control of the street or highway proposed to be occupied by such street or other railroad."

But, as was said in City of Helena v. Helena Light & Railway Co., 63 Mont. 108, (207 Pac. 337) on page 117:

"Section 12 *does not grant any right or power to a city or town.* In the absence of that restric-

tion, the legislature could grant a franchise directly to a street railway company to occupy and use a city's streets, upon such terms as the law makers saw fit to exact, and that, too, *without consulting the city authorities and in utter disregard of their expressed opposition.* The presence of that provision in our Constitution does not modify the principle that the grant of a franchise proceeds from the legislature." (Italics ours.)

Not only was the legislative authority to grant franchises in city streets in all other cases left unimpaired, but by Section 14 of Article XV of the Constitution, the right of associations and corporations, organized for the purpose of constructing or maintaining lines of telegraph or telephone within the state was expressly granted, and the legislative assembly was required "by general law of uniform operation to provide reasonable regulations to give full effect to this section".

This constitutional provision was not, as was held in State ex rel Rocky Mountain Bell Telephone Co. v. Mayor of Red Lodge, 30 Mont. 338, 76 Pac. 758, and in State ex rel Crumb v. City of Helena, 34 Mont. 67, 85 Pac. 744, self-executing, but legislation was required to make the right granted effective. That was done in 1895 by Section 1000 of the Civil Codes of 1895, reading as follows:

"A telegraph or telephone corporation, or a person, is hereby authorized to construct such

telegraph or telephone line or lines from point to point, along and upon any of the public roads, by the erection of necessary fixtures, including posts, piers and abutments, necessary for the wires; *but the same shall not incommode the public in the use of said roads or highways.*" (Italics ours.)

In 1905 Section 1000, above quoted, was amended by including therein: "electric light or electric power-line corporation, or a person owning or operating such," and adding a proviso that the Act shall not apply "to public roads and highways within the limits of incorporated cities or towns". Section 1000 as thus amended reads as follows:

"A telegraph, telephone, electric light or electric power-line corporation, or a person owning or operating such, is hereby authorized to construct such telegraph, telephone, electric light, or electric power line or power lines; from point to point along and upon any of the public roads and highways of the State of Montana, by the erection of necessary fixtures, including posts, piers and abutments necessary for the wires; but the same shall be so constructed as not to incommode or endanger the public in the use of said roads or highways; provided, however, that the provisions of this Act shall not apply to public roads and highways within the limits of incorporated cities or towns."

The proviso in the amendment of 1905 that the

Act "shall not apply to public roads and highways within the limits of incorporated cities or towns" was declared unconstitutional in the case of State ex rel Crumb v. City of Helena, 34 Mont. 67, 85 Pac. 744, and this decision prompted the further amendment of the statute by Chapter 192 of the Laws of 1907, page 502, which was carried forward into the Revised Codes of Montana of 1935 as Section 6645, hereinbefore quoted.

The statute, as thus amended, grants to electric light and electric power line corporations the same unconditional right to construct and operate an electric light and power line as is granted to telegraph and telephone corporations.

As was said in City of Helena v. Helena Light & Railway Co., 63 Mont. 108, (207 Pac. 337) on pp. 116 to 117:

> "Primarily, the power to grant a franchise rests exclusively in the Legislature, * * * and though it may be doubted whether such power can be delegated, it is recognized generally that a franchise may be derived from the state indirectly, *through the agency* which it may designate for that purpose (citing cases) and whenever a city assumes to grant a franchise, *it acts merely as the agent of the state, and this is true in this jurisdiction,* * * *" (Italics ours.)

As stated in 26 Corpus Juris, "Franchises", at p. 1026:

> "The authority by which the power to grant

franchises is conferred can abolish it or take it away. * * * * *

The delegation to an agent of the power to grant franchises *will not prevent the state from making the grant of a franchise directly.*" (Italics ours.)

Appellants contend that, notwithstanding Section 6645 of the Revised Codes of Montana of 1935, appellee is without authority to maintain or operate its electric plant or system without obtaining a franchise from or consent of the City, and, in support of this contention, refers to Section 5075 of the Revised Codes of Montana of 1935, reading as follows:

"No franchise for any purpose whatsoever shall be granted by any city or town, or by the mayor or city council thereof, to any person or persons, association, or corporation, without first submitting the application therefor to the resident freeholders whose names shall appear on the city or county tax-roll preceding such election."

The application of this section is shown by the case of State ex rel. Billings v. Billings Gas Co., 55 Mont. 102, 173 Pac. 799, decided June 24, 1918. That case involved the validity of a franchise granted by the City of Billings to a gas company authorizing the laying of mains and pipes in the streets. The court, in the opinion, said:

"The right granted to the company to use the streets for laying its mains is a franchise."

The court further said:

"A city is prohibited by section 3291, Revised Codes, (now Sec. 5075, Revised Codes of 1935), from granting a franchise *of the character of the one now under consideration,* until the application for it has first been submitted to and approved by the qualified electors, and this statute was in force at the time the franchise in question was granted." (Italics ours.)

As Section 6645 contains an unconditional grant, Section 5075, above quoted, can apply only to franchises emanating from and granted by municipalities, which they, by delegated authority, are permitted to grant.

State v. City of Sheboygan, 111 Wis. 23, 86 N. W. 657;

City of Kenosha v. Kenosha Home Tel. Co., 149 Wis. 338, 135 N. W. 848;

Inyo County v. Hess, 53 Cal. App. 415, 200 Pac. 373;

Postal Telegraph & Cable Co. v. Railroad Commission, 200 Cal. 463, 254 Pac. 258, 261;

Village of Carthage v. Central New York Tel. & Tel. Co., 185 N. Y. 448, 78 N. E. 165;

City of Texarkana v. Southwestern Tel. & Tel. Co., 48 Tex. Civ. App. Rep. 16, 106 S. W. 915;

Village of Constantine v. Michigan G. & E. Co., 296 Mich. 719, 296 N. W. 847.

In the case of State v. City of Sheyboygan, above cited, it appeared that the Wisconsin Telephone

Company, engaged in operating a telephone system in the City of Sheboygan, contemplated the enlargement or extension of its system within the city. The Telephone Company presented to the Mayor and Common Council its proposed plan of enlargement or extension and expressed a willingness to conform to any and all reasonable requirements or changes thought necessary or desirable in its proposed plan. The City refused to approve the plan and an application was made for a writ of mandamus to compel approval. The lower court denied the writ, basing its decision largely on Section 940 (b) of the Revised Statutes of Wisconsin of 1898. In the opinion of the Supreme Court it is said: The Telephone Company's

> "authority to use and occupy the streets and highways of the state is granted by section 1778, Rev. St. 1898, which came into existence in 1848. So far as is material to this litigation, such section reads as follows: 'Any corporation formed under this chapter to build and operate telephones, or conduct the business of telegraphing, may construct and maintain any such lines with all necessary appurtenances, from point to point upon or along or across any public road, highway or bridge or any stream or body of water, or upon the land of any owner consenting thereto, and from time to time extend the same at pleasure; * * * but no such telegraph line or any appurtenance thereto shall at any time ob-

struct or incommode the public use of any road, highway, bridge, stream or body of water'."

In the opinion it is further said:

"Section 940b, Rev. St. 1898, provides that no franchise shall be granted by any village board or common council until the application therefor, containing the substance of the privileges asked for, shall be filed with the village or city clerk, and be published in the official paper. * * * * As we have already seen, the power to exist as a corporation, and to exercise the franchise of the use of highways and streets, as against the public, was already possessed by the relator. The city had no power to add to or detract therefrom except in the exercise of its police power. The franchise existed by express legislative grant. Its exercise might be controlled only in recognition of its existence, and in conformity with a just and reasonable administration of the police power in the interest of the city and its inhabitants. In a sense, the city was called upon to grant a privilege. It had the power to regulate the use of its streets. It might deem it improper to allow poles to be set along some of the streets included in the proposed extensions. It might designate other streets, and thus exercise a reasonable discretion in the interests of its people. But such privilege was controllable only in harmony with the rights both possessed. In no proper sense was

the privilege sought a franchise, within the meaning of section 940b. The consent of the city was only required or asked in view of its right to regulate. Having that power, it was its plain legal duty, when a plan had been submitted as its ordinance required, to take such action thereon as reason and a proper regard for the interests and legal rights of all concerned would seem to suggest."

In the later case of City of Kenosha v. Kenosha Home Telephone Company, 149 Wis. 338, 135 N. W. 848, above cited, the Supreme Court of Wisconsin said:

"The only franchise needed by a telephone company to enable it to conduct its business anywhere within the state is the franchise conferred upon it by virtue of section 1778, Stats., when it is incorporated pursuant thereto. (Citing many cases). Such franchise confers upon the incorporated telephone company full and adequate authority to construct its lines upon the public highways of the state and the streets of municipalities subject only to reasonable regulations under the police power. (Citing cases). The attempted exercise, therefore, by the city of the legislative function of granting a franchise was ineffectual and void. (Citing cases.)

In the case of City of Texarkana v. Southwestern Tel. & Tel. Co., 48 Texas Civ. App. Rep. 16, 106 S. W. 915, above cited, the court said:

"A solution of the most vexed question presented on the appeal depends upon the construction of the statutes authorizing magnetic telegraph lines to occupy the public roads, streets, etc., in this state on the one hand, and that granting to the city council of incorporated cities and towns the exclusive control and power over streets, alleys, etc., of the city, on the other hand. Article 698, Sayles' Ann. Civ. St. Tex. 1897, reads: 'Corporations created for the purpose of constructing and maintaining magnetic telegraph lines are authorized to set their poles, piers, abutments, wires and other fixtures along, upon and across any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such road, streets and waters'."

The court further said:

"It is a rule of construction too familiar to admit of the citation of authorities that statutes are to be so construed, if possible, as that all parts may stand. It is still another rule, equally as familiar, that repeals by implication are not favored in law. Applying those rules to the present case we have no difficulty in reaching the conclusion that the Legislature did not intend by granting to city councils the exclusive control of streets, alleys, and public grounds within their corporate limits to set at naught the authority previously given by it to telegraph and

telephone lines to occupy such highways with the poles, piers, wires, etc."

In the case of State ex rel. Telephone Company v. Mayor, 30 Mont. 338, 76 Pac. 758, known as the Red Lodge case, the court, referring to Section 1000 of the Civil Code of 1895, said:

> "The language of the statute with reference to the privilege granted is plain and emphatic. It is a direct grant af authority by the legislature to use the public roads for the construction and maintenance of telephone and telegraph lines, subject only to the condition that the public shall not be incommoded 'in the use of said roads and highways'."

After Section 1000 of the Civil Code of 1895 was amended, by including therein "electric light or electric power-line corporations, or a person owning or operating such" what was said with reference to Section 1000 before the amendment applies equally to the section as amended, which included within its provisions "electric light or electric power-line corporations, or a person owning or operating such".

If it had been intended that an electric light or electric power-line corporation should not have the right to maintain and operate its line within a city without a franchise from or the consent of the city, the amendment, after the decision in the Red Lodge case, would have retained the proviso in Section 1000 as amended in 1905 to the extent that the same

applied to an electric light or electric power-line corporation or a person owning or operating such a line. Furthermore, if it is necessary for an electric power line corporation to have a franchise from the city, there was no occasion whatever for including such a corporation in Section 1000 as amended.

Section 5075 of the Codes of 1935 was enacted as it now reads in 1903 (Chapter 85 of the Laws of 1903), whereas Section 6645 was enacted in 1907 (Chapter 192 of the Laws of 1907).

In the brief for appellants it is argued (pp. 52, et seq.) that in the case of State v. City of Helena, 34 Mont. 67, 85 Pac. 744, the proviso in Section 1000, as amended in 1905, was declared unconstitutional only to the extent that the same applied to telegraph and telephone lines.

Unquestionably, a statute may be unconstitutional in part, or even a section of a statute may contain both constitutional and unconstitutional provisions. Whether, when a part of a statute or a section of a statute is unconstitutional, the question for determination is whether the statute or section would have been enacted without the unconstitutional provision, and this is a question of legislative intent to be determined by the courts.

Cooley's Constitutional Limitations, 5th Edition, p. 211, et seq.

The court, in concluding the opinion in the case of State v. City of Helena, 34 Mont. 67, 85 Pac. 744, said:

"With the proviso eliminated from the Act of

1905, the conditions presented in this case are the same as in the *Red Lodge case,* and the decision rendered therein is conclusive of this appeal." (Italics ours).

This language cannot be construed otherwise than that the court intended to eliminate the proviso as unconstitutional. In any event, this was evidently the construction of the decision by the Legislative Assembly in adopting the amendment of 1907, which did not include the proviso or make any distinction between telephone lines and electric light and power lines. In other words, by the amendatory act of 1907, the same franchise, right or privilege was granted to electric light and power lines as for telegraph and telephone lines and, as a matter of fact, it is wholly immaterial whether the proviso was declared unconstitutional in whole or in part, in view of the amendment.

It is further argued for appellants that as it is provided in Section 6645 that nothing therein should "be so construed as to restrict the power of city or town councils", there is reserved to cities and towns the right to grant franchises for electric light and power lines.

The answer to this contention is found in the opinion in the case of Butte v. Montana Independent Telephone Co., 50 Mont. 574, 148 Pac. 384, which involved the validity of a city ordinance requiring telephone wires to be placed underground. In the opinion in that case the court said:

"In 1895 the legislature enacted section 4800, Political Code (Rev. Codes, sec. 3259), which provides, among other things: 'The city or town council has power: * * * 8. To provide for and regulate street crossings, curbs and gutters; to regulate and prevent the use or obstruction of streets, sidewalks and public grounds, by signs, poles, wires, posting hand bills or advertisements, or any obstruction. * * * 43. To regulate or suppress the erection of poles and the stringing of wires, rods or cables in the streets, alleys, or within the limits of any city or town.' With knowledge that these statutes were in full force and effect, the legislature in 1907 enacted what is now section 4400, Revised Codes, which defines certain rights of a telegraph, telephone, electric light or electric power line corporation, or a person owning or operating such, and then concludes: 'Nothing herein shall be so construed as to restrict the powers of city or town councils.' *By the use of this language the legislature must have intended to leave cities and towns a free hand to exercise the police powers granted in subdivisions 8 and 43 above; otherwise the expression is meaningless.*" (Italics ours.)

The provisions of Section 4800 of the Political Code of 1895, quoted in the foregoing extract from the opinion in the case of Butte v. Montana Independent Telegraph Co., are identical with Sections

5039.7 and 5039.42 of the Montana Codes of 1935.

That the powers conferred by Sections 5039.7 and 5039.42 are police powers is evident from the fact that the powers granted are powers to "regulate".

> City of Butte v. Paltrovich, 30 Mont. 18, 75 Pac. 521.

A franchise is not granted in the exercise of the police power.

It is further argued for appellants that the rule of strict construction should be applied to Section 6645 of the Codes of 1935, hereinbefore quoted, and that "a public utility cannot use the streets or alleys without the consent of the municipality, unless it is clearly apparent that such was the intention of the legislature". There could be no clearer expression of the intention of the legislature to grant to an electric light and power line corporation a franchise to construct, maintain and operate its line within a city than is contained in Section 6645 of the Revised Codes of 1935.

In the opinion of District Judge Pray, (R. p. 65) it is said:

> "Without discussing the question minutely as set forth in the voluminous briefs of counsel, it seems quite clear that plaintiff has a franchise (Sec. 6645, R. C. M. 1935), although one that is not exclusive,"

As appellants concede that if appellee has a franchise their contract "is at an end", (Appellants'

Brief, p. 50), we respectfully submit that the judgment of the District Court should be affirmed.

RIGHT OF APPELLEE TO CHALLENGE VALIDITY OF CONTRACT

Appellants contend that even though appellee may have a franchise, as it is not an exclusive franchise, appellee cannot challenge the validity of said contract, or the right of the City to acquire the municipal plant to be constructed according to the contract, as any damage which appellee might sustain by the performance of the contract and competition by the City would be *damnum absque injuria*. While we regard this question as unimportant in view of the concession of appellants that if appellee has a franchise, the contract is at an end, we submit that, although the franchise is not exclusive, it constitutes property and appellee is entitled to protection by injunctive relief against illegal competition, and that the competition which would result from the contract in question would be illegal, will be presently shown.

In the case of City of Campbell, Mo. v. Arkansas-Missouri Power Co., 55 Fed. (2d) 560, decided by the Circuit Court of Appeals for the 8th Circuit, and in which Fairbanks, Morse & Co. was a defendant, the court, in the opinion, at page 561, said:

> "In this case, appellee as plaintiff brought suit to enjoin the city of Campbell, a Missouri city of the fourth class, its executive officers, and Fairbanks, Morse & Co., a corporation, from

carrying out the provisions of a certain contract which the city had previously entered into with Fairbanks, Morse & Co. for the purchase of certain machinery for a municipal light plant, and to restrain the city from operating such a plant in competition with the appellee, because of the alleged illegality of that contract. The parties will be referred to as they appeared in the lower court.

Plaintiff is an electric power company engaged in the generation of electricity and the transmission of electric current into various municipalities for sale for private and public use. It is the owner of a franchise granting it the right to construct and operate an electric light plant and distribution system within the city of Campbell."

The court further said (p. 562):

"As the owner of this franchise, however, the plaintiff was entitled to relief against the illegal acts of others who might assume to exercise the privilege conferred upon it by its franchise. A franchise is property, and, as such, is under the protection of the law, and without express words it is exclusive as against all persons acting without legal sanction. True, plaintiff's franchise was not exclusive in the sense that the city might not grant similar right to another, yet it was exclusive against any one who assumed to exercise the privilege granted the plaintiff,

in the absence of authority or in defiance of law. (Citing many cases).

We are clear that the plaintiff, as the holder of this franchise to maintain and operate the plant in defendant city, was entitled to protection against all illegal competition."

It was decided that the contract between the City of Campbell and Fairbanks, Morse & Co., was void and the judgment of the District Court granting an injunction was affirmed.

The case of Arkansas-Missouri Power Co. v. City of Kennett, Mo., 78 Fed. (2d) 911, decided by the Circuit Court of Appeals for the 8th Circuit, was an action for an injunction to prevent the installation of a municipal plant. The plaintiff was the holder of a non-exclusive franchise. The court, in the opinion by Circuit Judge Sanborn, at page 914, said:

"If it (the city) is proceeding lawfully, the mere fact that the power company's property will be injured or destroyed, resulting in the impairment of the investments of those who furnished money to it in the belief that their investments would not be lost through the unnecessary duplication of the company's plants, is of no legal consequence. On the other hand, if the city is proceeding unlawfully, then the power company may invoke the rule of law which protects the owner of a franchise or permit, although it be nonexclusive, against the illegal acts of others who propose to exercise the privilege conferred by the franchise."

In the case of Frost v. Corporation Commission, 278 U. S. 515, 73 L. Ed. 483, the complainant and appellant was the owner of a franchise to operate a cotton ginning plant in the City of Durant, Oklahoma. In the opinion the court said:

> "Appellant, having complied with all the provisions of the statute, acquired a right to operate a gin in the city of Durant by valid grant from the state acting through the corporation commission. While the right thus acquired does not preclude the state from making similar valid grants to others, it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights."

See also:

Okla. Utilities Co. v. City of Hominy, 2 Fed. Supp. 849;

Illinois Power & Light Corp. v. City of Centralia, 11 Fed. Supp. 874.

Appellants in their brief cite as a controlling authority, in support of the proposition that any damage which appellee might suffer from the construction of the municipal plant would be damnum absque injuria, the case of Tennessee Electric Pow-

er Co. v. Tennessee Valley Authority, 306 U. S. 118, 83 L. Ed. 543.

The complainants in that case were public utility corporations engaged in generating and selling electricity pursuant to state authority, and the defendants were the Tennessee Valley Authority and its executive officers. In the opinion the court said:

> "The Authority's acts, which the appellants claim give rise to a cause of action, comprise (1) *the sale* of electric energy at wholesale to municipalities *empowered by state law to maintain and operate their own distribution systems;* (2) *the sale* of such energy at wholesale to membership corporations *organized under state law to purchase and distribute electricity to their members without profit;* (3) *the sale* of firm and secondary power at wholesale to industrial plants." (Italics ours.)

The court further said:

> "The pith of the complaint is the Authority's competition."

It was contended in behalf of T. V. A. and its officers that, as the franchises of appellants were not exclusive, any damages which appellants might suffer from competition resulting from the sale of electricity as proposed by T. V. A. would be damnum absque injuria, and for this reason appellants could not challenge the constitutionality of the Tennessee Valley Authority Act. This contention was sustained. The appellants made no claim that the sale

of electricity as proposed would be in violation of any state law.

The court, in discussing the right of the appellants to question the constitutionality of the Act, said:

> "The appellants further argue that even if invasion of their franchise rights does not give them standing, they may, by suit, challenge the constitutionality of the statutory grant of power the exercise of which results in competition. This is but to say that if the commodity used by a competitor was not lawfully obtained by it the corporation with which it competes may render it liable in damages or enjoin it from further competition because of the illegal derivation of that which it sells."

The court, in deciding that the appellants could not question the constitutionality of said Act cited in a foot-note to the opinion in support of its decision the case of Alabama Power Co. v. Ickes, 302 U. S. 464, 82 L. Ed. 374. In that case it appeared that Mr. Ickes as Administrator of the Federal Emergency Administration of Public Works had entered into agreements with four municipal corporations in Alabama which contemplated the construction of electricity-distribution systems. The agreements provided for the making of loans to the municipalities and the donation of 45% of the cost of labor and materials used in construction. In the opinion the court said:

> "Each of the municipalities is authorized un-

der state law to construct and operate municipal electric plants and distribution systems, and to engage in competition with petitioner."

It was argued for the complainants that, as a result of the loans and grants and the maintaining of rival and competing plants, the complainants would suffer damage by the loss of business. The court in the opinion further said:

> "It, therefore, appears that each of the municipalities in question has authority to construct and operate its proposed plant and distribution system in competition with petitioner, and to borrow money, issue bonds, and receive grants for that purpose; * * * * * * * In short, the case for petitioner comes down to the contention that consummation of the loan-and-grant agreements should be enjoined on the sole and detached ground that the administrator lacks constitutional and statutory authority to make them, and that the resulting moneys, which the municipalities have clear authority to take, will be used by the municipalities in lawful, albeit destructive, competition with petitioner. * * * * * *
>
> The ultimate question which, therefore, emerges is one of great breadth. Can anyone who will suffer injurious consequences from the lawful use of money about to be unlawfully loaned maintain a suit to enjoin the loan?"

This question was answered in the negative and it was decided that any damage complainants might suffer would be damnum absque injuria.

In closing the opinion the court said:

"Frost v. Corporation Commission, 278 U. S. 515, 73 L. Ed. 483, 49 S. Ct. 235, relied upon by petitioner, presents an altogether different situation. Appellant there owned a cotton-ginning business in the city of Durant, Oklahoma, for the operation of which he had a license from the corporation commission. The law of Oklahoma provided that no gin should be operated without a license from the commission, which could be obtained only upon specified conditions. We held that such a license was a franchise constituting a property right within the protection of the Fourteenth Amendment; and that while the acquisition of the franchise did not preclude the state from making similar valid grants to others, it was exclusive against an attempt to operate a competing gin without a permit or under a void permit. The Durant Cooperative Gin Company sought to obtain a permit from the commission which, for reasons stated in our opinion, we held would be void and a clear invasion of Frost's property rights. We concluded that a legal right of Frost to be free from such competition would be invaded by one not having a valid franchise to compete, and sustained Frost's right to an injunction against the commission and the Durant Company. See Corporation Commission v. Lowe, 281 U. S. 431, 435, 74 L. Ed. 945, 948, 50 S. Ct. 397. The difference

between the Frost Case and this is fundamental; for the competition contemplated there was unlawful while that of the municipalities contemplated here is entirely lawful."

It is apparent that the Tennessee Electric Power Company case does not and was not intended to overrule the case of Frost v. Corporation Commission.

In all of the other cases cited in support of the proposition that any damages appellee may suffer would be damnum absque injuria, the question presented was the same as the question decided in the Alabama Power Company v. Ickes and in the Tennessee Electric Power Company case,—that is the right to challenge the constitutionality of Federal aid.

In the case before the Court no complaint is made of any action by the Federal Government in furnishing money or otherwise, or that such a contract as to Fairbanks, Morse & Co. would be *ultra vires.* We are making no contention that Fairbanks, Morse & Co. is without authority to enter into such a contract. What we are contending is that the state law does not authorize the City of Forsyth to enter into the contract in question or to acquire an electric plant in the manner in which it is proposed, and that the contract is void for want of mutuality. In other words, that the City would be an illegal competitor of appellee by virtue of state law.

A city in Montana in acquiring and operating an

electric light and power plant exercises its business or proprietary powers, as distinguished from its governmental powers, and "stands upon the same footing as a private individual or a business corporation similarly situated".

Milligan v. City of Miles City, 51 Mont. 374, 384, 153 Pac. 276, 278.

If, as we contend, the City of Forsyth is not authorized to make such a contract, or the contract is lacking in mutuality, it is in the situation of an individual who would undertake, without authority of law, to construct and operate an electric plant in Forsyth in competition with appellee.

Irrespective of appellee's rights by virtue of its franchise, to maintain this action, it has such right as the owner of taxable property in the City of Forsyth.

RIGHT OF APPELLEE TO MAINTAIN ACTION AS A TAXPAYER.

In the complaint it is alleged that the appellee is the owner of an electric light and power plant and is and has been for several years engaged in furnishing electric light and power to said city and its inhabitants. This allegation is admitted. It follows therefrom that the appellee is a taxpayer in said city.

In the case of Milligan v. City of Miles City, et al., 51 Mont. 374, 153 Pac. 276, the plaintiff, as a taxpayer, sought an injunction to prevent the city from extending its steam electric light and power plant

for the purpose of furnishing steam heat for private consumption, at a cost of $10,600.00, which would be replaced from revenues derived from the sale of steam. The right of the plaintiff to maintain the action, as a taxpayer, was challenged. The court in the opinion said:

> "The plant is their (the taxpayers) property. The revenues derived from the sale of its product belong to them, because, though kept separate from the revenues derived from general taxation, they are part of the public moneys.
>
> The rule is well settled that, in the absence of legislation restricting the right to interfere to some public officer, the courts will, upon the application of one or more of the individual taxpayers, interfere by appropriate process to prevent an unlawful expenditure of public money by the officers of the corporation or the incurring of an obligation which will render such expenditure necessary. There never has been any such restrictive legislation in this jurisdiction, *and from an early date in the history of the state the right of the taxpayer to maintain an action to prevent or restrain misuse of corporate power has been recognized and enforced.* (Citing several Montana cases). The conclusion that the plaintiff may maintain the action was therefore correct." (Italics ours).

While the allegation of the complaint that the appellee is a taxpayer is denied, the denial is nullified

by the admission of facts which make appellee a taxpayer.

CONTRACT VOID FOR WANT OF MUTUALITY

The contract contains the following provision, to-wit:

> "The contractor will not be required to begin work until ten days after litigation for the ousting of the power company now serving the city from its streets has been finally determined in favor of the city. The work shall be completed within 180 days after commencement."

As Fairbanks, Morse & Co. is not required to begin work until ten days after litigation for the ousting of the plaintiff has been finally determined in favor of the City, it, of course, follows that if it should be determined that the plaintiff has a valid franchise and cannot be ousted, it is optional with Fairbanks, Morse & Co. whether the electric plant will be constructed. In other words, the defendant Fairbanks, Morse & Co. does not obligate itself to construct the plant unless it is finally determined that the plaintiff is without a franchise.

We, therefore, submit the contract is invalid and unenforcible because of want of mutuality.

In Parsons on Contracts, Volume 1, 9th Ed., at page 449, it is said:

> "that a promise is not a good consideration for a promise unless there is an absolute mutuality of engagement, so that each party has the

right at once to hold the other to a positive agreement."

In 13 Corpus Juris, p. 331, it is said:

"Mutuality of contract consists in the obligation on each party to do, or to permit something to be done, in consideration of the act or promise of the other. Contracts lacking in mutuality are often termed unilateral contracts. Mutuality of obligation is an essential element of every enforceable agreement. Mutuality is absent when one only of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only."

The principle stated by Parsons was applied in the case of Pocatello v. Fidelity & Deposit Co. of Maryland, 267 Fed. 181, in an opinion by the Circuit Court of Appeals for the 9th Circuit. In that case, which was an action on the bond of a surety for a contractor who had entered into a contract with the City of Pocatello relating to a municipal water supply for the city, for the recovery of an amount paid by the city in excess of the contract price for doing the work which the contract required to be done. The contract provided that if:

"for any reason the city of Pocatello shall fail to make sale of and receive money for the $150,000 of waterworks bonds due to be sold on the 8th day of January, 1917, then and in that event this contract, at the option of the party of the second part, may be terminated without the

party of the second part becoming liable in any manner or upon any account to the party of the first part upon any claim or demand whatsoever."

In the opinion, by Circuit Judge Hunt, it is said:

"The purpose of the city, as made apparent by the language of article 11, was to reserve the right to terminate the contract, provided it did not dispose of its bonds, and in the exercise of such right, to escape any liability to any one upon any claim or demand whatever. A contract of such a nature could not be enforced; it lacks mutuality. There was no performance by either party to the contract and no waiver of lack of mutuality. Parsons on Contracts (9th Ed.) 486."

In the opinion in the case of Wandell v. Johnson, 71 Mont. 73, 227 Pac. 58, the court said:

"Speaking generally, mutuality of obligation is an essential ingredient of an enforceable contract (Raiche v. Morrison, 37 Mont. 244, 95 Pac. 1061), and mutuality is lacking, of course, when only one of the contracting parties is bound to perform (6 Cal. Jur. 211; 13 C. J. 331)."

The District Court decided that the contract is void for want of mutuality.

CITY OF FORSYTH WITHOUT AUTHORITY TO MAKE SUCH A CONTRACT

The statute, Section 5039.63 of the Revised Codes of Montana of 1935 provides:

"The city or town council has power: To

> contract an indebtedness on behalf of the city or town, and upon the credit thereof, by borrowing money or issuing bonds for the following purposes, to-wit: Erection of * * * lighting plants * * *."

A "lighting plant" which the city or town is thus authorized to erect, in the manner provided in the Section above quoted, is a lighting plant or system to supply the needs of both the city and its inhabitants.

> Milligan v. City of Miles City, 51 Mont. 374, 384, 153 Pac. 276, 278.

It is our contention that the method thus provided for acquiring an electric plant is exclusive and that the city is without authority to acquire such a plant by the issuance of revenue bonds to be paid from the earnings of the plant.

It is the contention of appellants that the statute is a grant of power and not a limitation of the means by which the power may be exercised, and that the city has authority to make such a contract by virtue of its general powers. In other words, that the method provided in the section of the statute quoted for acquiring such a plant is not exclusive.

In the case of Shapard v. City of Missoula, 49 Mont. 269, 278, 141 Pac. 544, 547, it is said:

> "The rule is well settled in this jurisdiction and by the decisions generally that a municipal corporation can exercise no powers except those which are granted in express words or those

necessarily implied in or incident to the powers expressly granted, or those indispensable to the objects and purposes of the corporation, and that any reasonable doubt as to the existence of a particular power is to be resolved against the corporation (Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249; Helena L. & Ry. Co. v. City of Helena, 47 Mont. 18, 130 Pac. 446), and that, when the mode of exercising any power is pointed out in the statute granting it, the mode thus prescribed must be pursued in all substantial particulars. (McGillic v. Corby, 37 Mont. 249, 17 L. R. A. 1263, 95 Pac. 1063; Carlson v. City of Helena, 39 Mont. 82, 17 Ann. Cas. 1233, 102 Pac. 39; see, also, Bolton v. Gilleran, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881; San Jose Imp. Co. v. Auzerais, 106 Cal. 498, 39 Pac. 859). The statute having defined the measure of the power granted, and also the mode by which it is to be exercised, the validity of the action of the legislative body of the municipality must be determined by an answer to the inquiry whether it has departed substantially from the mode prescribed."

State v. Dryburgh, 62 Mont. 36, 47, 203 Pac. 508;

Carlson v. City of Helena, 39 Mont. 82, 109, 102 Pac. 39;

State v. City of Great Falls, 110 Mont. 318, 100 Pac. (2d) 915, 920;

Wibaux Imp. Co. v. Brietenfeldt, 67 Mont. 206, 215 Pac. 222.

In the case of Milligan v. City of Miles City, 51 Mont. 374, 383, 153 Pac. 276, 278, the court said:

> "It is true, as counsel for the defendants argue, that the powers granted to a municipality are to be distinguished into two classes—the first including those which are legislative, public or governmental, and import sovereignty; the second those which are proprietary or *quasi* private, conferred for the private advantage of the inhabitants and of the city itself as a legal person. (Citing cases.) Neverthless the statute is the measure of the power granted, whether the particular power in question is assignable to the one class or the other. The inquiry must always be in this class of cases: (1) Whether there is an express grant; (2) whether there is a grant by necessary implication; or (3) whether the power in question is indispensable to the accomplishment of the object of the corporation."

It seems to us that the case of Shapard v. City of Missoula, and the Milligan case, from which we have quoted, are conclusive of the proposition that the City of Forsyth is without power or authority to make such a contract, in view of Section 5039.63 of the Revised Codes of Montana of 1935. However, by the great weight of authority, where a method is provided by statute for a municipality to acquire an electric plant, that method is exclusive.

Fairbanks, Morse & Co. v. City of Wagoner, 86 Fed. (2d) 288;

Kansas Power Co. v. Fairbanks, Morse & Co., 142 Kan. 109, 45 Pac. (2d) 872;

Whipps v. Town of Greybull, 56 Wyo. 355, 109 Pac. (2d) 805, (decided February 4, 1941);

Van Eaton v. Town of Sidney, 211 Ia. 986, 231 N. W. 475;

Interstate Power Co. of Neb. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649;

Ahern v. Richardson County, 127 Neb. 659, 256 N. W. 515;

Hesse v. City of Watertown, 47 S. D. 325, 232 N. W. 53;

Tierney v. Cohen, 268 N. Y. 464, 198 N. E. 225;

Lassen Municipal Utility Dist. v. Hopper, 5 Cal. (2d) 18, 53 Pac. (2d) 347;

State v. McWilliams, 335 Mo. 816, 74 S. W. (2d) 363.

In the case of Fairbanks, Morse & Co. v. City of Wagoner, above cited, the Circuit Court of Appeals for the Tenth Circuit, in an opinion by Phillips, Circuit Judge, said:

> "We conclude that section 27 art. 10, of the Oklahoma Constitution, quoted in note 1 to our former opinion herein (81 Fed. (2d) 209, 212) provides the exclusive method by which a city may finance the cost of an electric power plant, other than from current funds on hand

> or presently to be available from lawful tax levies already made from current earnings, or from the proceeds of a bond issue authorized in accordance with section 26, art. 10, of the Oklahoma Constitution."

Section 27 of Article 10 of the Oklahoma Constitution, quoted in Note 1 to the former opinion of the Court in the same case, in 81 Fed. (2d) 209, reads as follows:

> "Sec. 27. Any incorporated city or town in this State may, by a majority of the qualified property taxpaying voters of such city or town, voting at an election to be held for that purpose, be allowed to become indebted in a larger amount than that specified in section twenty-six, for the purpose of purchasing or constructing public utilities, or for repairing the same, to be owned exclusively by such city: * * *."

In the case of Kansas Power Company v. Fairbanks, Morse & Co., above cited, the court said:

> "It seems clear to this court that, since a specific method of financing the establishment of a municipal light and power plant is prescribed by statute, and that statutory method gives no sanction to the proposed method of payment challenged in this action, the contract is illegal in its main features, and this court must so hold."

In the case of Whipps v. Town of Greybull, above cited, in which the appellee herein intervened, the

court in an extended and able opinion reviews the authorities and in the opinion said:

> "It seems clear to this court that, since a specific method of financing the establishment of a municipal light and power plant is prescribed by statute, and that statutory method gives no sanction to the proposed method of payment challenged in this action, the contract is illegal in its main features, and this court must so hold."

In the brief for appellants the cases of Carr v. Fenstermacher, 119 Neb. 172, 228 N. W. 114, and Johnston v. City of Stuart, (Ia.), 226 N. W. 164, are cited and it is said: (pp. 47 and 48 of Appellants' Brief) that the case of Van Eaton v. Town of Sidney, 211 Iowa 986, 231 N. W. 475, is "off-set" by the case of Johnston v. City of Stuart, 226 N. W. (Ia.) 164, and that the case of Interstate Power Company v. Ainsworth, 125 Neb. 419, 250 N. W. 649, is "off-set" by the case of City of Carr v. Fenstermacher, 119 Neb. 172, 228 N. W. 114. We say that the earlier cases in Nebraska and Iowa cited by appellants were over-ruled by the later cases in those states.

We will not undertake to review the cases cited in the brief for appellants. Several of these cases involve the question of such a contract creating the excessive indebtedness. We are not contending that the contract in question would create any excessive indebtedness. From our reading and analysis of the cases cited by appellants, we believe that we are correct in the statement that the only cases in which

it was decided that the grant of power to a city to acquire a lighting plant on the credit of the city by borrowing money or issuing bonds is merely permissive and does not prohibit the issuance of what are termed revenue bonds, are the cases from North Dakota, Nebraska, Minnesota and Iowa, and the cases from Iowa and Nebraska have been over-ruled by later decisions.

In the case of Farmers State Bank v. City of Conrad, 100 Mont. 415, 47 Pac. (2d) 853, the question considered was the power or authority of the City to enter into a contract with the State Water Conservation Board for the procurement of a supply of water for the city. The proposed contract provided for the payment of $6,000 a year for the supply from revenue to be derived by the City from the operation of the water plant. The City had previously issued bonds for the purpose of procuring a water supply and the plaintiff, who was one of the bondholders, contended that the use of the revenues from the plant for the payment of the additional supply would injure him as a bondholder. The court found against the plaintiff on this issue. It was further contended by the plaintiff that the contract would create an illegal indebtedness. The court decided that such a contract does not create a prohibited indebtedness for the reason that the cost of the additional supply was to be paid for by revenue derived from the operation of the water system. No question was presented as to the authority of the city to make such a contract except that it would violate

the rights of the plaintiff as a bondholder and would create an unlawful indebtedness against the city. The court found that the amount to be paid each year was less than the cost then being paid by the city for pumping and pipe line repair, and in the opinion the court said:

> "Expenditure for one is as much operating cost as the other, and no injury done to any interested party. This being true, there is no merit in plaintiff's contention that using a part of the revenues realized from water sales under a plant established and maintained by virtue of the provisions of section 6 of Article XIII of the Constitution violates any of the provisions of that section."

Section 5039.63 of the Revised Codes of Montana of 1935 expressly authorizes a city to procure a water supply by devoting the revenues derived therefrom to the payment of the debt.

It thus appears that the method adopted by the city for procuring the water supply was expressly authorized.

If the Legislative Assembly of Montana had intended that a city can procure an electric plant by devoting the revenues therefrom to the payment therefor, it certainly would have so provided as it did with reference to a water supply.

CHAPTER 115, LAWS OF 1937, AS AMENDED IN 1939.

In the brief for appellants, on page 33, it is said that Chapter 115 of the Laws of Montana of

1937, as amended and extended by Chapter 111 of the Laws of 1939, authorizes the construction of any "project" to be paid for solely out of the earnings of such project, and that by virtue of this statute the City has authority "to erect a municipal lighting plant without reference to the provisions of Section 5039.63."

Section 1 of Chapter 115 provided as follows:

> "The economic depression prevailing throughout the United States and foreign countries has caused widespread unemployment, poverty, dependency and distress among people in the State of Montana, and to such extent that the public peace, order and tranquillity are seriously endangered, and the orderly processes of government may be imperiled. Local, state and federal means for relief so far made available are hopelessly inadequate. The entire situation constitutes a grave emergency in the history of our State. This emergency is hereby recognized and declared to exist.
>
> In accordance with the fundamental principles and purposes of the government of this nation and of this State, we hereby declare it to be the policy of this legislative assembly to meet the existing emergency by providing public work for unemployed and distressed people throughout the State and thereby 'insure domestic tranquillity and promote the general welfare'."

Section 10 of the Act provided that the act should

"expire and stand repealed on December 31, 1939". By Chapter 111 of the Laws of Montana of 1939, approved March 3, 1939, the Act was amended by extending the same to March 15, 1941.

Both the original act and the amended act authorized the "procuring of a supply of water for a municipality which shall own and control such water supply and devote the revenues derived therefrom to the payment of the debt". Nothing whatever is said with reference to the procurement of an electric plant, but there is authority in the original act to contract for the construction of any project to be paid for solely from the earnings of said project, and without liability on the part of the governmental subdivision or agency contracting for the construction of same.

It is a well understood rule of statutory construction that where "one statute deals with a subject in general and comprehensive terms, and another deals with a part of the same subject in a more minute and definite way, the latter will prevail over the former to the extent of any necessary repugnancy between them" (Barth v. Ely, 85 Mont. 310, 322, 278 Pac. 1002). This rule is declared by Section 10520 of the Revised Codes of Montana of 1935, reading as follows:

> "The intention of the legislature or parties. In the construction of a statute the intention of the legislature, and in the construction of the instrument the intention of the parties, is to be pursued if possible; and when a general and

particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it."

Applying this rule to Chapter 115, as amended, and Section 5039.63 of the Revised Codes of Montana of 1935, said Chapter 115, as amended, has no reference to an electric lighting plant and such a plant is not a "project" referred to.

This construction is also supported by the fact that by Chapter 115, as amended, authority is expressly conferred to procure "a supply of water for a municipality which shall own and control such water supply and devote the revenues derived therefrom to the payment of the debt". If it had been intended that a city could, in like manner, procure a lighting plant, it certainly would have been so provided. The rule *expressio unius est exclusio alterius* applies.

As the whole purpose of Chapter 115, as amended, was to provide for the unemployed and distressed people throughout the state during what was declared the "existing emergency", which the Legislative Assembly determined would end on March 15, 1941, it was clearly intended that any contract made should be performed before the emergency ended. As the contract has not been performed or anything done by either party to carry out the contract, the repeal of Chapter 115, as amended, assuming that the same authorized the making of such a contract, has abrogated the contract.

In 59 Corpus Juris, page 1185, it is said that:

> "in the absence of a saving clause or other clear expression of intention, the repeal of a statute has the effect, except as to transactions past and closed, of blotting it out as completely as if it had never existed, and putting an end to all proceedings under it. However, the repeal of a statute will not operate to impair rights vested under it,"

In the case of Pearsall v. Great Northern R. Co., 161 U. S. 646, 673, 40 L. Ed. 838, 847, the court quotes approvingly the definition of vested rights by Mr. Justice Cooley in his work on Constitutional Limitations, as follows:

> "It is said by Mr. Justice Cooley that 'rights are vested, in contra-distinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting'."

As, by the contract in question, Fairbanks, Morse & Co. were not required to begin work until ten days after "litigation for the ousting of the Power Company" should be "finally determined in favor of the

City", no rights have vested by virtue of the contract.

* * * * * * * * *

The District Court decided:

1. That the Court has jurisdiction.
2. That appellee has a franchise.
3. That, by virtue of said franchise, although not exclusive, appellee can maintain this action, and will be protected against illegal competition.
4. That the method provided by the statute for acquiring an electric plant is exclusive and the City was without authority to enter into the contract in question.
5. That the said contract is wanting in mutuality and, therefore, not enforcible.
6. That Chapter 111 of the Laws of 1939 has no application and does not "supersede or modify in any respect the plain and specific mandatory provisions of Section 5039.63 R. C. M."

The judgment of the District Court should be affirmed.

Respectfully submitted,

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